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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 388

JEANNE KING

versus

VICO INSURANCE COMPANY OF ST. LOUIS

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT.

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VICO INSURANCE COMPANY OF ST. LOUIS

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT.

To the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

Petitioner respectfully prays that:

(a) A writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered on May 2, 1966, whereby petitioner's right and title to a money judgment, based on a jury verdict, of Three Thousand Five Hundred Seventy-Five and No/100 ($3575.00) Dollars, against named defendant, were confiscated and destroyed by state judicial officers acting in excess of their constitutional authority and in violation of petitioner's rights guaranteed by the Seventh and Fourth Amendments to the Constitution of the United States.

Petitioner, having incurred serious and disabling injuries as a result of the negligence of defendant's insured, tried her claim for damages to a jury. The jury, who by virtue of state law are the sole judges of the facts, returned a verdict for plaintiff in the sum of Three Thousand Five Hundred Seventy-Five and No/100 ($3575.00) Dollars, based on a fact finding of negligence hedged by unarguably proper instructions as to the law. Petitioner's right to this money judgment has been taken from her by the Court of Appeal of Louisiana, Fourth Circuit, solely as a result of that court having substituted its findings of fact for that of the jury, without having heard and seen the witnesses and thus without the benefit of demeanor evidence.

Petitioner's application for rehearing before said appellate court, in which she complained that the Court's action infringed her rights guaranteed by the Seventh and Fourteenth Amendments to the United States Constitution, perfunctorily was denied. Resort to Louisiana State Supreme Court for writ of review was equally without avail. Thus, Petitioner stands deprived of her property without due process.

OPINIONS BELOW

1. Ignoring the findings of fact of the jury, the Court of Appeal of Louisiana, Fourth Circuit, on January 10, 1966, substituted its findings of fact for that of the jury, vacated petitioner's judgment against the defendant in the amount of Three Thousand Five Hundred Seventy-Five and No/100 ($3575.00) Dollars and dismissed her suit. Petitioner, being thus confronted by the denial of her constitutional right, in her application for rehearing timely filed urged upon that court that the re-examination by it of the jury's findings of fact was proscribed by the pro-

visions of the Seventh Amendment of the Constitution of the United States. Furthermore, petitioner urged, should it be held that the Seventh Amendment was not obligatory on the state, then the right to trial by jury, (especially once having been granted to petitioner by state law), the integrity of its verdict and the rights accruing to petitioner thereunder (which include the rights and privileges defined by the provisions of the Seventh Amendment) were inalienable rights implicit in the concept of ordered liberty and therefore secured to petitioner by the Fourteenth Amendment to the Constitution of the United States and thus the appellate court's decision, taking away petitioner's money judgment as it did, summarily without hearing the evidence, denied the petitioner of her property without due process and equal protection of the law. Petitioner's rehearing application was denied without the assignment of reasons. (*King v. VICO Insurance Company of St. Louis*, 182 So. (2d) 135. Opinion reproduced Appendix A, *infra*, pp. 13-20.

2. The Louisiana Supreme Court, to which petitioner applied for writ of certiorari or review in respect to the decision of the Court of Appeal of Louisiana, Fourth Circuit, on May 2, 1966, denied petitioner's application ruling as follows:

> "Writ refused. **On the facts found by the Court of Appeal,** there is no error of law in its judgment." (*King v. VICO Insurance Company of St. Louis*, ____ So. (2d) ____.)

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1. Is the Seventh Amendment to the United States Constitution obligatory on the states of the Union?

2. Is a citizen denied constitutional due process and equal protection in violation of the Fourteenth Amendment by the action of state judicial officers acting officially as a state appellate court in not only re-examining but in reversing the findings of fact by a jury, without recourse to new trial, where the state by legislative enactment has granted a citizen the right to trial by jury within the contemplation of the Seventh Amendment to the United States Constitution?

STATE STATUTE INVOLVED

The state statute involved and which grants right to trial by jury is Louisiana Code of Civil Procedure, Articles 1731-1814, the text of which is fully reproduced herein as Appendix B, *infra*, pp. 21 to 29, and the organic law sanctioning the enactment of such legislation, namely, Louisiana Constitution, Article 7, Section 41, in part pertinent hereto provides:

> "The legislature **shall** provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * * ."

CONCISE STATEMENT OF THE CASE

On April 6, 1964, petitioner was riding as a passenger in an automobile owned and operated by Linda Ray, defendant's insured.

That Linda Ray did, without warning apply her brakes causing petitioner's head to strike the windshield of the

automobile. As a result she sustained disabling permanent injuries, and medical expenses.

In due course she instituted a damage suit against VICO Insurance Company of St. Louis, the insurer of Linda Ray and prayed that this claim be tried to a jury. Jury trial was held on April 8, 1965, which resulted in a unanimous verdict in favor of petitioner.

On April 8, 1965, the trial judge entered judgment for petitioner in the amount of $3575.00, together with interest and costs.

Defendant appealed to the Louisiana Court of Appeal, Fourth Circuit, and on January 10, 1966, that Court supplanted the jury's findings of fact as to negligence with that of its own, vacated judgment in favor of petitioner and dismissed her lawsuit.

Thereafter petitioner timely filed application for rehearing in which petitioner contended that the action of the appellate court in re-examining and reversing the findings of fact as to negligence of the jury was proscribed by the Seventh and Fourteenth Amendments to the United States Constitution. Petitioner's application for rehearing was denied without the assignment of reasons. Thereafter petitioner timely applied for writ of certiorari or review to the Louisiana Supreme Court. That court on May 2, 1966, denied petitioner's application, noting that on the "facts" found by the "Court of Appeal", there was no error of law in its judgment. Thus the Louisiana Supreme Court has sanctioned the taking of petitioner's money judgment by the process of permitting an appellate court to substitute its findings of fact for that of the jury in the context of State law which institutes the jury as the sole judge of the facts.

REASONS FOR GRANTING RELIEF

Ample evidence was presented to the jury which tried petitioner's case to support the jury's findings that defendant was guilty of negligence and that petitioner was free from fault. Thus, in the historical context of trial by jury, the jury verdict in favor of petitioner on the issue of negligence is conclusive if the evidence though disputed, contains probative facts sufficient to support it, however much the trial or appellate court may disagree with the jury's findings of fact. (*Basham v. Pennsylvania Railroad Company*, 83 S. Ct. 963 (1963); *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740 (1946).

The framers of the Louisiana Constitution gave a mandate to the Legislature of Louisiana to institute trial by jury. Louisiana Constitution, Article 7, Section 41, provides:

> "A Legislature **shall** provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * *."

Acting in pursuance of this constitutional mandate, the Legislature of Louisiana granted to all of its citizens the absolute right to trial by jury enacting the provisions of Louisiana Code of Civil Procedure, Articles 1731-1814. The Legislature instituted the jurors in civil cases as the sole judges of the facts and expressly prohibited the trial judge from either recapitulating or even commenting upon the evidence so as not to exercise "any influence upon their decision as to the facts." Louisiana Code of Civil Procedure, Article 1792. The trial court is without authority to alter or modify the verdict of the jury. Its sole remedy or authority is to grant a new trial. It may enter a remittitur or an additur but then only with the consent of the parties

and only as an alternative to the granting of a new trial. Louisiana Code of Civil Procedure, Article 1813.

Thus, the citizens of Louisiana have been granted the right to trial by jury in the common law tradition.

The grant of such a right to trial by jury carries with it the grant of the historical attributes of jury trial. Necessarily included among these historical attributes is the proscription of the Seventh Amendment against the re-examination of the findings of the jury by any court. This right, therefore, falls under the protective aegis of the Seventh Amendment, and, operating through the Fourteenth Amendment, its constraint is obligatory on the State of Louisiana. The State having granted petitioner the right to trial by jury, thus instituted trial by jury as a concomitant part of the legal process by which petitioner is entitled to have his rights adjudicated. Consequently, this right to trial by jury is an inalienable right implicit in the concept of ordered liberty and secured to petitioner by the Fourteenth Amendment to the United States Constitution.

A contrary view is logically and legally impermissible. For if the wisdom or judgment of the jury is supplanted by the critical judgment of disagreeing appellate court judges, then indeed there exists no legal creature such as trial by jury. In such a prospective, trial by jury is a figment of the imagination, the vagary of legal sophistry. Such a proposition mocks justice. It defies logic, decries tradition and denies petitioner of a legal birthright.

This court last year had occasion to adjudicate in the constitutional area involved in this application, the only exception being that the court was dealing with a jury verdict in a criminal case. *Turner v. State of Louisiana*, 379

U.S. 466, 85 S. Ct. 546. In commenting upon the constitutional standards and constraints that apply once a state has granted right to trial by jury, this court commented (85 S. Ct. at p. 549).

> "This case does not involve the question whether the Fourteenth Amendment requires a state to accord a jury trial to a defendant charged with murder. The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment **commands when trial by jury is what the state has purported to accord.** * * *
>
> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the **fundamental integrity** of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage —of the court, the body ordained to pass upon guilt or innocence. * * *'"

Similarly, the proscription against re-examining the findings of fact by the jury by any court is an inherent part of the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. It goes to the very center of trial by jury. In fact it is the sine qua non of jury trial guaranteed to every citizen by the Seventh Amendment.

The action of the judges of the appellate court infringes petitioner's constitutional rights in another area. Admittedly, these judicial officers did not see and hear, the witnesses testify. Thus, they did not have the benefit of demeanor evidence, by which to gauge the credibility of the witnesses and determine the weight to be given to their testimony. But the right to present demeanor evidence is a constitutional right secured to citizens by the Fifth and Fourteenth Amendments to the United States Constitution.

S. Buchsbaum and Company v. Federal Trade Commission, 153 So. (2d) 85.

The United States Constitution is the supreme law of the land, binding alike upon states, courts and the people, anything in the constitution or laws of any state to the contrary notwithstanding. *Testa v. Katt*, 330 U.S. 386, 391, 67 S. Ct. 810, 813. The obligation to guard and enforce every right secured by that constitution rests upon the state courts equally with the federal courts. *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S. Ct. 340, 342; *Smith v. O'Grady*, 312 U.S. 329, 331, 61 S. Ct. 572, 573.

The Louisiana Court of Appeal, Fourth Circuit, not only has failed to fulfill this inescapable obligation, but by its decision it has denied to petitioner his federally secured rights. The Louisiana Supreme Court has approved this denial. In fact the Louisiana Supreme Court has augmented or otherwise dramatized this denial. In approving of the judgment of the Court of Appeals it relied not on the facts found by the jury but on the "facts found by the Court of Appeal." Thus it gave greater credence to the fact findings of the Court of Appeal, the judges of which never saw or heard the witnesses, than it did to the fact findings of the jury, as to which the Seventh Amendment proscribes re-examination.

CONCLUSION

The State of Louisiana has granted petitioner a plenary right of trial by jury. Thus the state has purported to accord petitioner the right to have her claims adjudicated by a jury as a concomitant part of available legal processes. The right not to have the jury findings re-examined by any court goes to the fundamental integrity of all that is embraced in the constitutional concept of trial

by jury. In re-examining these findings, the Louisiana Court of Appeal, Fourth Circuit, has denied petitioner of the right to trial by jury. Consequently, the action of this appellate court and of the Louisiana Supreme Court in thus denying petitioner of her right to trial by jury, violates the Seventh and Fourteenth Amendments of the United States Constitution. This action results in a denial to petitioner of her property without due process. She is without remedy other than that which may be secured to her by the grant of this application.

Respectfully submitted,

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CERTIFICATE

STATE OF LOUISIANA
PARISH OF LAFAYETTE:

I, J. Minos Simon, counsel for petitioner and a member of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

Honorable Melvin J. Keenan, Clerk,
Louisiana Court of Appeals, Fourth Circuit
New Orleans, Louisiana.

Mr. Val. J. Courville, Clerk,
Louisiana Supreme Court,
New Orleans, Louisiana.

Porteous & Johnson,
Hibernia Building,
New Orleans, Louisiana.

J. MINOS SIMON

Sworn to and subscribed
before me this _____
day of July, 1966, at
Lafayette, Louisiana.

Notary Public

APPENDIX A

Jan 10 1966

COURT OF APPEAL
FOURTH CIRCUIT — STATE OF LOUISIANA

No. 1998

JEANNE KING
VS.
VICO INSURANCE COMPANY
OF ST. LOUIS

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, No. 427-467, DIVISION "F", HONORABLE ALEXANDER E. RAINOLD, JUDGE.

GEORGE JANVIER
JUDGE

(Court composed of Judges Louis H. Yarrut, Paul E. Chasez and George Janvier)

HATTIER, SCHROEDER & KUNTZ, HERMAN M. SCHROEDER, for plaintiff-appellee.

PORTEOUS & JOHNSON, WILLIAM A. PORTEOUS, JR., for defendant-appellant.

REVERSED.

Plaintiff, a guest passenger in a Volkswagen automobile of her friend, Linda Ray, sustained injuries when, as a result of the sudden stopping of the car by Miss Ray, her head struck the windshield, and, in addition to the slight bruise on her forehead, she sustained a "cervical spinal sprain."

Miss Ray had secured a policy of liability insurance from Vico Insurance Company of St. Louis, and Miss Jeanne King, plaintiff, by direct action, brought this suit against the said insurer, alleging that the accident had been caused by fault on the part of Miss Ray in unnecessarily and without warning bringing her car to a sudden stop. She prayed for judgment for $36,732.02 and for trial by jury. Miss Ray was not made defendant.

The defendant answered, denying negligence on the part of Miss Ray and averring "that a dog ran out into the street in front of the vehicle," and that Miss Ray, "acting in a sudden emergency not of her own creation * * *, applied her brakes to avoid hitting the dog." The said insurer then alleged that the dog had belonged to Douglas Allen, and that the said Allen had negligently, and, in violation of a city ordinance, permitted it to run at large and that, therefore, should it, the insurer, be held liable to plaintiff, there should be judgment in its favor against said Allen for such amount as might be awarded plaintiff. Allen could not be located and there was no service on him. Accordingly, the matter went to trial between plaintiff and the insurer of Miss Ray, and there was a unanimous verdict on which there was judgment in favor of Miss Ray in the sum of $3375. There was also the award of an expert's fee of $150.

Defendant insurer has appealed, and contends that not only should the judgment be reversed, but that should it be

found that there is liability, the amount of the judgment should be reduced.

The policy of insurance included medical payments coverage under which the insurer had agreed to pay the medical expenses of anyone who might be injured as the result of the operation of the car regardless of whether or not there was negligence on the part of the driver. Accordingly, it is conceded that, under this provision of the policy, the medical expenses of plaintiff, amounting to $762, were paid by the insurer.

So far as the facts are concerned, there is no evidence which, except in minor particulars, tends to contradict the story of the accident as related by Miss Ray, the operator of the car.

With the plaintiff alongside her, she was driving in a downtown direction on Carondelet Street, which is a one-way street, in the direction in which she was operating the car. As she neared the corner of Philip Street, there were vehicles parked on both sides leaving only a narrow roadway open between them. She brought her car to a stop behind another car which had stopped before turning to its right into Philip Street. While both vehicles were stopped, a dog "walked out in the street." Miss Ray says that the dog "went back and I thought he was gone." She then started forward—she says, in low gear and at a speed of about five miles an hour and "had gotten about even with the corner" when the dog "ran out in front of me." She says that after she first saw the dog and it "walked back to the sidewalk," she "didn't see him any more until he ran out in front of me."

Plaintiff says that at that time she was not looking forward and did not see the dog until later because she

"had her head down * * *." She says that she had her purse in her lap and that she "was looking to get a cigarette out of my purse." When she did look up she says the dog, which, according to her, "was sort of a large dog," was "either by the side of the street or on the curb."

Only on two rather unimportant points is there disagreement between Miss King and Miss Ray. Miss Ray says that before starting on the trip downtown, plaintiff had had one "Scotch and water" to drink, but she herself had not taken a drink. Plaintiff says that she had had a drink and that Miss Ray had had one also. There was no effort to show that liquor had had any effect on either.

On one other point the two ladies are not in complete agreement. Miss Ray says that she had stopped her car behind the other vehicle and had then started it when the dog ran into the street, and Miss King at first said that there had been no intervening stop, but later said: "I don't remember if we did."

We repeat that there is nothing whatever which tends to contradict the story of Miss Ray, the driver of the car. The record leaves no doubt at all that she had stopped behind the other vehicle; that she had seen the dog walk out into the street and then go back to the sidewalk, "I think, towards Philip Street."

Accordingly, we feel that in bringing her car to a stop Miss Ray instinctively did exactly what other normal persons in the full possession of their faculties would have done. She brought her car to a sudden and immediate stop. She had no time to consider whether it was best to strike the dog and run the risk of a more serious accident, or to bring the car to a sudden stop.

Here and elsewhere there is abundant authority to the effect that it is not actionable negligence to bring a car to a sudden stop in an emergency not created by the driver where there is an occurrence which may cause serious accident and where the reaction of the driver must take place before there is time to consider the possible result of the sudden stop, and where the driver does what any ordinarily careful driver would have done and does not increase the peril by acting in an abnormal way.

In *Dean v. Travelers Insurance Company*, 171 So. 2d 708, we recognized this principle and held that where a sudden emergency arises, the driver "is not to be held to the same high standard as one who is able to survey the alternative courses of action in a calm and unhurried atmosphere."

It is true that in that case we held the driver of the car at fault for the reason that she did not react as a normal person should have reacted. It appeared that when a child ran out from the left side of the road, the driver of the car, instead of merely trying to stop, released the steering wheel which permitted the car to go "across the road into a ditch and over a culvert, a driveway and up out of the ditch and into a utility pole."

Referring again to the view that the reaction in an emergency should be the normal reaction of an ordinarily careful person, we said that while the "emotional reaction" of the driver of the car which caused her to lose completely the control of the automobile might have been the normal reaction of that particular driver, it was not the reaction "to be expected of a person of reasonable self-control."

We find the question of normal reaction in the case of sudden emergency has been discussed many times. In

Burhans v. Burhans, 159 Md. 370, 150 Atl. 795, the driver of a car saw a large dog coming from a side road onto the road on which she was driving. She applied her brakes and attempted to avoid striking the dog. The car skidded, turned around, hit a culvert and turned over. The Court said that there was nothing to show that the driver was negligent in attempting to avoid a collision with the dog and added "nor is it shown, we think, that she did anything in her attempt to avoid a collision with the dog that an ordinarily prudent person would not have done when placed in such perilous situation."

In *Olson v. Hermansen*, 196 Wis. 614, 220 N.W. 203, 61 A.L.R. 1243, two dogs jumped from behind a car in front of the driver's car, and, in attempting to avoid the dogs, the car turned over and death resulted. The Court, referring to the driver, said: " * * * the conduct of the dogs clearly created an emergency, in which she acted in good faith and in accordance with her best degree of skill."

In a New York case, *Sills v. Meyers*, 171 Misc. 63, 11 N.Y.S. 2d 106, the driver of a car saw a cat crossing the highway, and, in attempting to avoid it, brought the car to a sudden stop. In that case the Court held the driver was at fault; but said that the cat in front of the car "was not an emergency" but that "if, of course, a person or a large animal, or a large object, was in the road which if collided with would have caused injury * * *, it would be an emergency * * * ."

In *Pickett v. Travelers Ins. Company*, 127 So. 2d 547, appears the following:

> "The evidence in this case establishes without contradiction that plaintiff's bull suddenly darted on the highway in front of the insured vehicle, and that the driver of that car then veered to his left

> and applied his brakes forcefully in an unsuccessful attempt to avoid striking the animal. We think the driver exercised reasonable care in attempting to avoid the accident, and that under the circumstances presented here he was not guilty of actionable negligence in electing to strike the animal rather than to drive off the highway and down the enbankment which bordered it."

It is true that in the *Pickett* case Judge Tate dissented, but he did so for the reason that he did not feel that the evidence had sustained the contention that the accident had happened as a result of the "sudden jump into his (driver) path of the bull * * *." And, in fact, Judge Tate later, in *Huval v. Burke*, 160 So. 2d 810, cited with approval the *Pickett* case.

We conclude, then, that unless the reaction of Miss Ray was abnormal and was not the reaction of a reasonably prudent careful driver, she was not at fault in bringing her car to a stop. But it is contended that she must have been operating the car at too great a speed and that this was the cause of the injuries which would not have been sustained except for that speed.

Miss Ray said that her speed was not more than five miles an hour; that the car was in low gear, and that she had just started it, and the only evidence which is pointed to as indicating unnecessarily high speed is the statement of Miss King herself that when her head struck the windshield, the windshield "was not broken out or anything like that, but all cracked, you know as you all described, I think, a spider web effect or something." This in itself does not indicate unduly high speed. In leaning forward to look into her bag, Miss King's head was nearer to the windshield than it otherwise would have been, especially as the

car was a very small one in which the occupants were closer to the windshield than they would have been in a larger car. The striking of the windshield could not have been violent as at first Miss King did not think that she had been injured. She said: "I didn't think I was hurt at all." It was not until later in the day when, in spite of the accident, she kept an appointment at the beauty parlor, that the operator there noticed that she "had a little lump on my head."

We are convinced that Miss Ray operated her car in a normal way, was not running it at an abnormal speed, and did nothing to increase the danger after the emergency became apparent.

The judgment appealed from is annulled, avoided and reversed, and plaintiff's suit is dismissed at her cost.

REVERSED.

APPENDIX B

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLES 1731-1814

Article 1731 Issues triable by jury.

Except as limited by Article 1733, the right to trial by jury is recognized.

The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury.

Article 1732 Demand for jury trial.

A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue.

Article 1733 Limitation upon jury trials.

A trial by jury shall not be available in:

(1) A suit demanding less than one thousand dollars exclusive of interest and costs;

(2) A suit on an unconditional obligation to pay a specific sum of money; unless the defense thereto is forgery, fraud; error, want or failure of consideration;

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, workmen's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from

bed and board, annulment of marriage, or divorce proceeding;

(4) A proceeding to review an action by an administrative or municipal body; and

(5) All cases where a jury trial is specifically denied by law.

Article 1734 Specification of issues.

In his demand a party may specify the issues which he wishes to be tried by jury; otherwise he shall be considered to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within ten days after service of the demand or such lesser time as the court may order, may demand trial by jury of any or all of the other issues in the action.

Article 1735 Trial of less than all issues; stipulation.

The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, or unless the right to trial by jury as to certain issues does not exist, but in all cases there shall be but one trial.

SECTION 2. SELECTION OF JURY

Article 1751 Qualification and exemptions of jurors.

The qualification and exemptions of jurors and the method of choosing and summoning the general venire in jury cases are provided by special laws.

SECTION 3. PROCEDURE FOR CALLING AND EXAMINING JURORS

Article 1761 Procedure in general

In cases to be tried by jury, twelve jurors summoned in accordance with law shall be chosen by lot to try the case. The method of calling and drawing by lot shall be at the discretion of the court. The parties may stipulate for a lesser number of jurors to try the case; or that if one or more of the jurors dies or becomes disqualified the remaining jurors shall try the case.

Article 1762 Swearing of juror before examination.

Every prospective juror, before being examined, shall be sworn to answer truthfully such questions as may be propounded to him.

Article 1763 Examination of juror.

The court shall permit the parties or their attorneys to conduct the examination of a prospective juror and may itself conduct an examination, which shall be limited to ascertaining the qualifications of the juror.

Article 1764 Peremptory challenges.

Each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination on the voir dire.

Article 1765 Challenges for cause.

A juror may be challenged for cause based upon any of the following:

(1) When the juror lacks a qualification required by law;

(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;

(3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict;

(4) When the juror served on a previous jury, which tried the same case or one arising out of the same facts;

(5) When the juror refuses to answer a question on the voir dire examination on the ground that his answer might tend to incriminate him.

Article 1766 Time for peremptory challenge.

After the entire jury has been accepted and sworn, no party has the right to challenge peremptorily.

Article 1767 Challenging or excusing jurors after acceptance.

Although the entire jury may have been accepted and sworn, up to the beginning of the taking of evidence, a juror may be challenged for cause by either side or be ex-

cused either for cause or by consent of both sides, and the panel completed in the ordinary course.

Article 1768 Swearing of jurors; selection of foreman.

When the jury has been accepted by all parties, the jurors shall be sworn to try the case in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

Article 1769 Alternate jurors.

The court may direct that one or two jurors in addition to the regular panel be called and empanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If one or two alternate jurors are called, each side shall have an equal number of peremptory challenges. The court shall determine how many challenges shall be allowed and shall allocate them among the parties on each side. The additional peremptory challenges may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternate jurors.

SECTION 4. PROCEDURE IN JURY TRIALS

Article 1791 Time for charging the jury; recordation of charge.

After the trial of the case and the presentation of all the evidence and arguments, the court shall charge the jury in accordance with law. This charge shall be in writing or recorded in the same manner as testimony taken in the case.

Article 1792 Contents of charge to jury.

In his charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decision as to the facts.

Article 1793 Instruction to jury; objections.

At the close of the evidence or at an earlier time during the trial as the court reasonably directs, a party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Article 1794 Taking evidence to jury room.

In reaching a verdict the jurors must rely upon their

memories, and, when they retire from the jury room to deliberate, they shall not be allowed access to any written evidence or to any notes of the testimony of any witness, but they may take with them any object or document received in evidence which requires a physical examination to enable them to arrive at a just conclusion.

Article 1795 Number required for verdict; stipulation.

In order to render any verdict, nine of the jurors must concur therein. The parties may stipulate, however, that the concurrence of a stated majority of the jurors shall be sufficient for a verdict, and must do so when they have stipulated for a trial by a lesser number in accordance with Article 1761.

SECTION 5. VERDICTS

Article 1811 Special verdicts.

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The Court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall

be presumed to have made a finding in accord with the judgment on the special verdict.

Article 1812 General verdict accompanied by answer to interrogatories.

The court may submit to the jury, with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

When the answers are inconsistent with each other and one or more is likewise consistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers or may order a new trial.

Article 1813 Remittitur or additur as alternative to new trial; reformation of verdict.

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be

granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Article 1814 New trial on showing of misconduct by jury.

A new trial shall be granted if it be proved that the jury was bribed or has behaved improperly so that impartial justice has not been done.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 388

JEANNE KING,

Petitioner,

versus

VICO INSURANCE COMPANY OF ST. LOUIS,

Respondent.

Brief in Opposition to Petitioner's Application for Writ of Certiorari.

BRIEF SUBMITTED ON BEHALF OF RESPONDENT-APPELLEE.

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IN THE

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JEANNE KING,

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VICO INSURANCE COMPANY OF ST. LOUIS,

Respondent.

BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

OPINION BELOW.

The opinion of the Louisiana Court of Appeals for the Fourth Circuit is reported in the Transcript of Record and at 182 So. 2d 135 (La. App. 1966), and in the Appendix hereto.

QUESTIONS PRESENTED.

1. Whether the record indicates that the Louisiana Court of Appeals for the Fourth Circuit reviewed conclusions of fact or conclusions of law.

2. Whether the Seventh Amendment to the United States Constitution is obligatory on the states of the Union by operation of the Fourteenth Amendment.

STATUTES INVOLVED.

Amendment VII to the United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules at common law.

LSA-Const. Art. 7, §10(6):

In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.

LSA-Const. Art. 7, §27:

All cases on appeal to the Courts of Appeal shall be tried on the original record, pleadings, and evidence.

The rules of practice regulating appeals to and proceedings in the Supreme Court shall apply to appeals and proceedings in the Courts of Appeal, so far as they may be applicable, until otherwise provided.

STATEMENT OF THE CASE.

Petitioner, Jeanne King, has sued for injuries which she received while a passenger in an automobile owned and operated by Linda Ray. The automobile is insured by the defendant, Vico Insurance Company of St. Louis.

The accident from which this action arises occurred on April 6, 1964 in the following manner: Miss Linda Ray had stopped her automobile behind another vehicle at an intersection. When the way became clear, Miss Ray started her vehicle and, almost immediately after her car had resumed motion, a dog darted out into the street. Seeing the dog in her path, Miss Ray applied her brakes without warning, and petitioner went forward, striking her head against the windshield. In the trial court, the jury, found in favor of petitioner, Miss King. On appeal, however, the Louisiana Court of Appeal, Fourth Circuit, reversed the lower court. Judge Janvier found no negligence on the part of defendant's insured and deemed her action to be reasonable in view of the sudden emergency with which she was confronted.

Petitioner contends that the Louisiana Court of Appeals has reviewed facts found by the jury below and has acted in contradiction to those facts. Petitioner asserts that the appeal court's action is in violation of the Seventh and Fourteenth Amendments to the Constitution of the United States.

Petitioner filed an appeal to the Louisiana Supreme Court, but that court did not see fit to grant a writ of certiorari. Petitioner now appeals to the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT.

1. The Louisiana Court of Appeal did not review facts in the instant case. In consideration of the same facts found at the trial, the appellate court arrived at a different conclusion of law.

2. Even if the Court of Appeal had reviewed facts, petitioner still does not have a valid claim. The Seventh Amendment has never been ruled applicable to the states. The Seventh Amendment applies only to the Federal Government. It is clear that the states exercise control of their respective judicial systems and may direct the nature of their proceedings. The Louisiana Constitution allows review of law and fact by the Louisiana Courts of Appeal, and this law controls the instant situation.

ARGUMENT.

May it please the Court:

POINT I.

The record does not support petitioner's contention that a review of facts found by a jury has occurred in this case.

Petitioner contends that Judge Janvier, Louisiana Court of Appeal, Fourth Circuit, acted in opposition to the Seventh and Fourteenth Amendments to the United States Constitution by reviewing facts found by the lower court in the above captioned case. Although the law consistently indicates that the States have the proper authority to determine the respective natures of their judicial proceedings, there is also a question if the Louisiana Court of Appeal has actually reviewed fact findings in this case.

The facts of this litigation are relatively simple. The insured, Linda Ray, was driving her insured automobile, and petitioner, King, was a guest passenger in that automobile. The pertinent facts found, in regard to petitioner's resultant injuries, were that the insured stopped her automobile suddenly and without warning and that Miss King was thrown forward against the windshield. Furthermore, the facts indicate that there was a dog which darted out into the street in front of the automobile immediately before Linda Ray made her abrupt stop.

On appraisal of these facts, the jury in the lower court found that Linda Ray's sudden stop constituted negligence. On appeal, however, the Court of Appeal, on the same facts, was of the opinion that Miss Ray's abrupt stop was an act in a sudden emergency and did not constitute negligence.

In consideration of this point, it is clear that the two courts reached different conclusions as to the

law—not as to fact. The jury in the lower court found that the factual circumstances constituted negligence on the part of the insured. The appeal court, *in consideration of the same facts,* found simply that these facts did not present a case of negligence, but rather a case of sudden emergency in which the act of the insured was not negligent.

In essence, the Court of Appeal simply came to a different legal conclusion than the jury did in regard to the facts. There is no dispute that the insured came to a sudden stop; this is a fact. However, whether or not that stop constituted negligence is a question of law incumbent upon the appeal court to decide.

In the opinion below, at 182 So.2d 135, 136, Judge Janvier emphasizes that the *facts* are indisputably clear and that his conclusion of *law* in regard to those facts overrules that of the lower court:

> We repeat that there is nothing whatever which tends to contradict the story of Miss Ray, the driver of the car. The record leaves no doubt at all that she had stopped behind the other vehicle; that she had seen the dog walk out into the street and then go back to the sidewalk, "I think, towards Philip Street."
>
> Accordingly, we feel that in bringing her car to a stop Miss Ray instinctively did exactly what other normal persons in the full possession of their faculties would have done. She brought her

car to a sudden and immediate stop. She had no time to consider whether it was best to strike the dog and run the risk of a more serious accident, or to bring the car to a stop.

So, in conclusion, this application is based upon an erroneous presumption. The Court of Appeal did not review facts in the instant case; it merely came to a contrary legal conclusion regarding those facts. To deprive the state appellate courts of this function would be to deprive them of their very essence, their *raison d'etre*. To give effect to petitioner's demands in this case would be to incalculably cripple the essential function of appellate courts—the duty to review questions of law.

POINT 2.

The Seventh Amendment to the United States Constitution is not obligatory on the states of the Union. Jury trial of a civil suit is not a right contemplated by the "privileges and immunities" clause of the Fourteenth Amendment and, as such, the provisions of the Seventh Amendment do not apply to the states. The state governments, which have the ultimate legislative responsibility in this regard, can determine the form and proceedings of their judiciaries, and in exercise of this function may grant the appellate power to review facts as well as law.

Petitioner's claim is dependent upon his contention that the Seventh Amendment protects rights and

privileges so fundamental to due process of law that it is necessarily operative upon the states through the Fourteenth Amendment. An examination of the law indicates that this position has never been supported by the Supreme Court of the United States. In fact, the directly opposite view has been consistently and repeatedly held to be the law.

The effect of the Federal Bill of Rights upon state law was considered early in the history of the Supreme Court. Chief Justice John Marshall established the position that the first ten amendments to the United States Constitution were limitations on the Federal Government and not on the states. In *Barron v. Baltimore*, 7 Pet. 242; 8 L. Ed. 672 (1833) at p. 675, Marshall held that:

> The amendments contain no expression indicating an intention to apply them to state governments. The court cannot so apply them.

The passage of the Fourteenth Amendment considerably modified Marshall's holding. The effect of the Fourteenth Amendment has been this: when rights secured by the first ten amendments are of such fundamental importance to due process of law, a state may not deprive a person of those rights. *Twining v. New Jersey*, 211 U. S. 78, 96; 29 S. Ct. 14, 18; 53 L. Ed. 97 (1908). At p. 103 of the Lawyer's Edition, Mr. Justice Moody states:

> If the right here asserted is not a Federal right, that is the end of the case. We have no

> authority to go further and determine whether the state court has erred in the interpretation of its own laws.

And further, the Court remarked that:

> The right of trial by jury in civil cases, guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678) and the right to bear arms, guaranteed by the Second Amendment (Presser v. Illinois, 116 U. S. 252, 29 L. Ed. 615, 6 Sup. Ct. Rep. 580), have been distinctly held not to be privileges and immunities of citizens of the United States, guaranteed by the Fourteenth Amendment against abridgment by the states,....

Thus, the effect of the Fourteenth Amendment is to incorporate some, but not all, of the Federal Bill of Rights. More importantly, the Supreme Court has not held that trial by jury in a civil trial is a fundamental element of due process of law and has not held that the requirement of trial by jury is mandatory upon the states.

The first case to directly consider the applicability of the Seventh Amendment to the states was *Edwards v. Elliott*, 88 U. S. 487; 22 L. Ed. 492; 21 Wall. 532, at 558 (1874), which dismissed the contention with the passing remark "That it does not apply to trials in the State Courts."

Two years later, the Supreme Court squarely decided whether the Fourteenth Amendment made

trial by jury in civil cases obligatory in state courts. In the leading case, *Walker v. Sauvinet*, 92 U. S. 90; 23 L. Ed. 678 (1876), petitioner alleged that a Louisiana Statute giving a judge the duty to direct a verdict when a jury was unable to agree on a decision violated the Seventh and Fourteenth Amendments and was unconstitutional. In holding the statute constitutional, the Court stated:

> "So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the Act of 1871 to the contrary.
>
> "By Article VII of the Amendments it is provided, that 'In suits at common law, ... the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. 492 (Sic). The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury is not a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the

> trial is had according to the settled course of judicial proceedings. Murray v. Hobken L. & I. Co. 18 How. 280, 15 L. Ed. 376. . .Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States." 92 U. S. 90, at 92-93.

The passage quoted above clearly and unmistakably states the position of the law in the present case. The principles enunciated in this decision have been frequently quoted by the Supreme Court and have been consistently followed and expanded since their inception.

The language of Mr. Justice Holmes is quite explicit on this point. Representing a unanimous Court in *Chicago, Rhode Island & Pacific Ry. Co. v. Cole*, 251 U. S. 54, 56; 40 S. Ct. 68, 69 (1919), Justice Holmes clearly illustrates that the Seventh Amendment has no application to the states:

> There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678; modify its constitution, Maxwell v. Dow, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; the requirements of a verdict, Minneapolis & St. Louis R.R. Co. v.

Bombolis, 241 U.S. 211; 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86 Ann. Cas. 1916E, 505; or the procedure before it, Twining v. New Jersey, 211 U.S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; Frank v. Mangum, 237 U.S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commission not known to the common law, Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in Spark v. United States, 156 U.S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and Georgia v. Brailsford, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed.

Shepard's United States Citations indicates that *Walker v. Sauvinet, supra,* has been cited by the Supreme Court in more than three dozen cases. None of these cases consider this case to be other than the definitive holding on the question of the Seventh Amendment's applicability to the states.

To exemplify this position, the following excerpt from Mr. Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937), at page 151, illustrates the reliance on *Walker v. Sauvinet*. Concerning the Seventh Amendment, Cardozo states:

> This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678; (numerous citations omitted).

This principle of law has been reiterated in numerous cases before the Supreme Court. The subsequent passages are typical:

Malinski v. N. Y., 324 U.S. 401; 65 S. Ct. 781 at 788 1944):

> ". . . to have jury trials in suits at common law. . . ., a requirement which this court has held over and over again for more than a hundred years does not apply to proceedings in state courts. . ." citing among others *Walker v. Sauvinet.*

Stein v. N. Y., 346 U.S. 156; 73 S. Ct. 1077 at 1090 (1953):

> "The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions between judge and jury as they see fit. Cf. Walker v. Sauvinet, 92 U.S. 90....."

It is relevant to note that the later overruling of *Stein v. N. Y.* did not affect or deal with this part of the opinion.

Hague v. C.I.O., 59 S. Ct. 954 (1939) at 966:

> "The privileges and immunities of citizens of the U.S. . . . are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws . . . . That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court . . . . Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement have uniformly been held not to be protected from State action by the privileges and immunities clause."

The decision in *Walker v. Sauvinet* has been relied upon so frequently that it is now well settled law.

Exemplary of state court application of the rule in *Walker v. Sauvinet* is the Louisiana case. *Whatley v. Love*, 13 So. 2d 719 (La. App. 1943). At page 722 the court states:

> As to the right of trial by jury said to have been conferred by Amendment 7 of the Constitution of the United States, it is sufficient to say

that this amendment has no application to State Courts.

And at page 723, the court continues:

> So completely have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.

The lower federal courts have held that this issue is so foreclosed as to fail to present a substantial federal question. This is illustrated in *New Jersey Chiropractic Association v. State Board*, 79 F. Supp. 327, at 337 (D.C. N.J. 1948):

> . . . the rule in Palko v. Connecticut, 302 U.S. 319, at p. 324, 58 S. Ct. 149, 151, 82 L. Ed. 288, governs as it is therein stated in the following language:
>
> > 'This court has ruled consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v.

> Sauvinet, 92 U.S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176, U.S. 581, 20 S. Ct. 448, 494, 44 L. Ed. 597; New York Central R. Co. v. White, 243 U.S. 188, 208, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D.I. Ann. Cas. 1917 D, 629; Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226, 232, 43 S. Ct. 589, 591, 67 L. Ed. 961.' Again the plaintiffs have failed to present a substantial federal question for consideration of the court because prior decisions of the United States Supreme Court have foreclosed this subject.

Also directly on point is *Olesin v. Trust Co. of Chicago*, 245 F. 2d 522, at 524 (C.A. 7th 1957) certiorari denied, 355 U.S. 896, 78 S. Ct. 270:

> It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. Bute v. People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 494, 44 L.Ed. 597; New York Central Railroad Company v. White, 243 U.S. 188, 208, 37 S.Ct. 247, 61 L.Ed. 667; Wagner Electric Manufacturing Company v. Lyndon, 262 U.S. 226, 232, 43 S.Ct. 589, 67 L.Ed. 961.

A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214. . . .

Ordinarily we are reluctant to dismiss an appeal upon motion. Usually we take the motion to dismiss with the cause and consider same when the case is submitted on the merits, but in the case at bar, it would be an imposition upon the defendants to inflict the expenses incident to an appeal when it is so clear that nothing that could be presented upon the hearings of the cause could change the obvious fact that this is a case where no federal question is involved, and the Federal Courts should not interfere with the processes and procedures of the State Court.

The appeal is dismissed at plaintiff's costs.

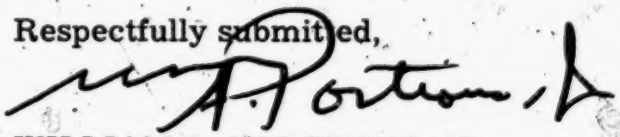
The numerous cases cited herein make it abundantly clear that the Seventh Amendment has no application to the states. The states may institute their judicial proceedings as they see fit. The State of Louisiana, in LSA-Const. Art. 7, §10(6), has empowered its appellate courts to review facts, and, in view of the authorities cited herein, the Louisiana State Constitution controls this instance.

In conclusion, it is respondent's contention that (1) the Louisiana Court of Appeal did not review facts in the instant case, and (2) even if such a situation did present itself, the law upon which petitioner relies does not apply to the states. In view of the unbroken and consistent line of decisions supporting the latter proposition, one may only conclude that the question raised by petitioner is forclosed and the law is settled.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should deny petitioner's application for a writ of certiorari.

Respectfully submitted,



WILLIAM A. PORTEOUS, JR.

CERTIFICATE.

STATE OF LOUISIANA
PARISH OF ORLEANS:

I, William A. Porteous, Jr., counsel for Respondent and a member of the bar of The United States Supreme Court, hereby affirm under oath that a copy of the foregoing opposition to petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

Honorable Melvin J. Keenan, Clerk,
Louisiana Court of Appeals, Fourth Circuit,
New Orleans, Louisiana.

Mr. Val. J. Courville, Clerk,
Louisiana Supreme Court,
New Orleans, Louisiana.

Herman M. Schroeder,
1314 Richards Building,
New Orleans, Louisiana.

J. Minos Simon,
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Post Office Box 52116 OCS,
Lafayette, Louisiana.

WILLIAM A PORTEOUS, JR.

Sworn to and subscribed before me this 19th day of September, 1966, at New Orleans, Louisiana.

Notary Public.

JEANNETTE B. WOEST
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

21

Jeanne KING

v.

VICO INSURANCE COMPANY OF ST. LOUIS

No. 1998.

Court of Appeal of Louisiana.
Fourth Circuit.

Jan. 10, 1966.

Rehearing Denied Feb. 7, 1966.

Passenger's action for personal injuries sustained when driver came to sudden stop was brought against driver's insurer. The Civil District Court for the Parish of Orleans, No. 427-467, Division "F", Alexander E. Rainold, J., entered judgment for passenger and insurer appealed. The Court of Appeal, Janvier, J., held that motorist who operated automobile in normal way, was not running it at abnormal speed, and did nothing to increase danger after dog appeared in roadway was not negligent and was free of liability to passenger who sustained head injuries when motorist abruptly stopped vehicle to avoid striking dog.

Reversed.

1. Automobiles—159

It is not actionable negligence to bring automobile to sudden stop in emergency not created by driver

where there is occurrence which may cause serious accident and where reaction of driver must take place before there is time to consider possible result of sudden stop and where driver does what any ordinarily careful driver would have done and does not increase peril by acting in abnormal way.

2. Automobiles—181(1).

Motorist who operated automobile in normal way, was not running it at abnormal speed, and did nothing to increase danger after dog appeared in roadway was not negligent and was free of liability to passenger who sustained head injuries when motorist abruptly stopped vehicle to avoid striking dog.

3. Automobiles—244(20,37)

Evidence was insufficient to establish that motorist who abruptly stopped vehicle to avoid striking dog in roadway was operating vehicle at too great a speed and that this was cause of passenger's head injuries sustained when passenger struck windshield.

Hattier, Schroeder & Kuntz, Herman M. Schroeder, New Orleans, for plaintiff-appellee.

Porteous & Johnson, William A. Porteous, Jr., and William A. Porteous III, New Orleans, for defendant-appellant.

Before YARRUT, CHASEZ and JANVIER, JJ.

JANVIER, Judge.

Plaintiff, a guest passenger in a Volkswagen automobile of her friend, Linda Ray, sustained injuries when, as a result of the sudden stopping of the car by Miss Ray, her head struck the windshield, and, in addition to the slight bruise on her forehead, she sustained a "cervical spinal sprain."

Miss Ray had secured a policy of liability insurance from Vico Insurance Company of St. Louis, and Miss Jeanne King, plaintiff, by direct action, brought this suit against the said insurer, alleging that the accident had been caused by fault on the part of Miss Ray in unnecessarily and without warning bringing her car to a sudden stop. She prayed for judgment for $36,732.02 and for trial by jury. Miss Ray was not made defendant.

The defendant answered, denying negligence on the part of Miss Ray and averring "that a dog ran out into the street in front of the vehicle," and that Miss Ray, "acting in a sudden emergency not of her own creation * * *, applied her brakes to avoid hitting the dog." The said insurer then alleged that the dog had belonged to Douglas Allen, and that the said Allen had negligently, and, in violation of a city ordinance, permitted it to run at large and that, therefore, should it, the insurer, be held liable to plaintiff, there should be judgment in its favor against said Allen for such amount as might be

awarded plaintiff. Allen could not be located and there was no service on him. Accordingly, the matter went to trial between plaintiff and the insurer of Miss Ray, and there was a unanimous verdict on which there was judgment in favor of Miss Ray in the sum of $3375. There was also the award of an expert's fee of $150.

Defendant insurer has appealed, and contends that not only should the judgment be reversed, but that should it be found that there is liability, the amount of the judgment should be reduced.

The policy of insurance included medical payments coverage under which the insurer had agreed to pay the medical expenses of anyone who might be injured as the result of the operation of the car regardless of whether or not there was negligence on the part of the driver. Accordingly, it is conceded that, under this provision of the policy, the medical expenses of plaintiff, amounting to $762, were paid by the insurer.

So far as the facts are concerned, there is no evidence which, except in minor particulars, tends to contradict the story of the accident as related by Miss Ray, the operator of the car.

With the plaintiff alongside her, she was driving in a downtown direction on Carondelet Street, which is a one-way street, in the direction in which she was operating the car. As she neared the corner of Philip

Street, there were vehicles parked on both sides leaving only a narrow roadway open between them. She brought her car to a stop behind another car which had stopped before turning to its right into Philip Street. While both vehicles were stopped, a dog "walked out in the street." Miss Ray says that the dog "went back and I thought he was gone." She then started forward—she says, in low gear and at a speed of about five miles an hour and "had gotten about even with the corner" when the dog "ran out in front of me." She says that after she first saw the dog and it "walked back to the sidewalk," she "didn't see him any more until he ran out in front of me."

Plaintiff says that at that time she was not looking forward and did not see the dog until later because she "had her head down* * *." She says that she had her purse in her lap and that she "was looking to get a cigarette out of my purse." When she did look up she says the dog, which, according to her, "was sort of a large dog," was "either by the side of the street or on the curb."

Only on two rather unimportant points is there disagreement between Miss King and Miss Ray. Miss Ray says that before starting on the trip downtown, plaintiff had had one "Scotch and water" to drink, but she herself had not taken a drink. Plaintiff says that she had had a drink and that Miss Ray had had one also. There was no effort to show that liquor had had any effect on either.

On one other point the two ladies are not in complete agreement. Miss Ray says that she had stopped her car behind the other vehicle and had then started it when the dog ran into the street, and Miss King at first said that there had been no intervening stop, but later said: "I don't remember if we did."

We repeat that there is nothing whatever which tends to contradict the story of Miss Ray, the driver of the car. The record leaves no doubt at all that she had stopped behind the other vehicle; that she had seen the dog walk out into the street and then go back to the sidewalk, "I think, towards Philip Street."

Accordingly, we feel that in bringing her car to a stop Miss Ray instinctively did exactly what other normal persons in the full possession of their faculties would have done. She brought her car to a sudden and immediate stop. She had no time to consider whether it was best to strike the dog and run the risk of a more serious accident, or to bring the car to a sudden stop.

[1] Here and elsewhere there is abundant authority to the effect that it is not actionable negligence to bring a car to a sudden stop in an emergency not created by the driver where there is an occurrence which may cause serious accident and where the reaction of the driver must take place before there is time to consider the possible result of the sudden stop, and where the driver does what any ordinarily careful driver would have done and does not increase the peril by acting in an abnormal way.

In Dean v. Travelers Insurance Company, La.App., 171 So.2d 708, we recognized this principle and held that where a sudden emergency arises, the driver "is not to be held to the same high standard as one who is able to survey the alternative courses of action in a calm and unhurried atmosphere."

It is true that in that case we held the driver of the car at fault for the reason that she did not react as a normal person should have reacted. It appeared that when a child ran out from the left side of the road, the driver of the car, instead of merely trying to stop, released the steering wheel which permitted the car to go "across the road into a ditch and over a culvert, a driveway and up out of the ditch and into a utility pole."

Referring again to the view that the reaction in an emergency should be the normal reaction of an ordinarily careful person, we said that while the "emotional reaction" of the driver of the car which caused her to lose completely the control of the automobile might have been the normal reaction of that particular driver, it was not the reaction "to be expected of a person of reasonable self-control."

We find the question of normal reaction in the case of sudden emergency has been discussed many times. In Burhans v. Burhans, 159 Md. 370, 150 A. 795, the driver of a car saw a large dog coming from a side road onto the road on which she was driving. She applied her brakes and attempted to avoid striking the dog. The car skidded, turned

around, hit a culvert and turned over. The Court said that there was nothing to show that the driver was negligent in attempting to avoid a collision with the dog and added "nor is it shown, we think, that she did anything in her attempt to avoid a collision with the dog that an ordinarily prudent person would not have done when suddenly placed in such perilous situation."

In Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203, 61 A.L.R. 1243, two dogs jumped from behind a car in front of the driver's car, and, in attempting to avoid the dogs, the car turned over and death resulted. The Court, referring to the driver, said: "* * * the conduct of the dogs clearly created an emergency, in which she acted in good faith and in accordance with her best degree of skill."

In a New York case, Sills v. Meyers, 171 Misc. 63, 11 N.Y.S.2d 106, the driver of a car saw a cat crossing the highway, and, in attempting to avoid it, brought the car to a sudden stop. In that case the Court held the driver was at fault, but said that the cat in front of the car "was not an emergency" but that "if, of course, a person or a large animal, or a large object, was in the road which if collided with would have caused injury * * *, it would be an emergency * * *."

In Pickett v. Travelers Ins. Company, La. App., 127 So.2d 547, appears the following:

> "The evidence in this case establishes without contradiction that plaintiff's bull suddenly

darted on the highway in front of the insured vehicle, and that the driver of that car then veered to his left and applied his brakes forcefully in an unsuccessful attempt to avoid striking the animal. We think the driver exercised reasonable care in attempting to avoid the accident, and that under the circumstances presented here he was not guilty of actionable negligence in electing to strike the animal rather than to drive off the highway and down the embankment which bordered."

It is true that in the Pickett case Judge Tate dissented, but he did so for the reason that he did not feel that the evidence had sustained the contention that the accident had happened as a result of the "sudden jump into his (driver) path of the bull * * *." And, in fact, Judge Tate later, in Huval v. Burke, La.App., 160 So.2d 810, cited with approval the Pickett case.

[2] We conclude, then, that unless the reaction of Miss Ray was abnormal and was not the reaction of a reasonably prudent careful driver, she was not at fault in bringing her car to a stop. But it is contended that she must have been operating the car at too great a speed and that this was the cause of the injuries which would not have been sustained except for that speed.

[3] Miss Ray said that her speed was not more than five miles an hour; that the car was in low

gear, and that she had just started it, and the only evidence which is pointed to as indicating unnecessarily high speed is the statement of Miss King herself that when her head struck the windshield, the windshield "was not broken out or anything like that, but all cracked, you know as you all described, I think, a spider web effect or something." This in itself does not indicate unduly high speed. In leaning forward to look into her bag, Miss King's head was nearer to the windshield than it otherwise would have been, especially as the car was a very small one in which the occupants were closer to the windshield than they would have been in a larger car. The striking of the windshield could not have been violent as at first Miss King did not think that she had been injured. She said: "I didn't think I was hurt at all." It was not until later in the day when, in spite of the accident, she kept an appointment at the beauty parlor, that the operator there noticed that she "had a little lump on my head."

We are convinced that Miss Ray operated her car in a normal way, was not running it at an abnormal speed, and did nothing to increase the danger after the emergency became apparent.

The judgment appealed from is annulled, avoided and reversed, and plaintiff's suit is dismissed at her cost.

Reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 48

DONALD HEIDER, *Petitioner*

v.

MICHIGAN SUGAR CO., *Respondent*

On Writ of Certiorari to The Supreme Court of Michigan

NO. 388

JEANNE KING, *Petitioner*

v.

VICO INSURANCE CO. OF ST. LOUIS, *Respondent*

On Petition for Rehearing of Denial Of Certiorari to the Louisiana Supreme Court

NO. 502

RUSSELL H. SITTON, ET UX., *Petitioners*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES AND BRIEF IN SUPPORT THEREOF

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The Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas

MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your Movants, Russell H. Sitton and wife, Barbara J. Sitton, being also the Petitioners in Case No. 502, aforesaid, do hereby move that the above styled cases, Nos. 48, 388 and 502, be jointly considered or formally consoli-

dated as the Court may deem most expeditious. In support thereof, Petitioners would show that the same involve common questions of fact and law arising under the Seventh and Fourteenth Amendments as more fully shown by the annexed brief.

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On Petition for a Writ of Certiorari to
The Court of Civil Appeals for the Fifth
Supreme Judicial District of Texas

BRIEF IN SUPPORT OF MOTION FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES

Your movants are the petitioners in Case No. 502. They submit that all three cases captioned above involve a common fact situation: that is, a jury verdict was returned for the plaintiff and later overturned by the court, either trial

or appellate, on evidentiary grounds without ordering a new trial. They further involve a common question of law: Is the clause against re-examination of jury verdicts contained in the Seventh Amendment applicable to the states by virtue of the Fourteenth? As set forth in the Sitton petition, the Supreme Court has never expressly ruled on the application of the clause against re-examination to the states.

THE HEIDER CASE

The decision in case number 48, *Heider v. Michigan Sugar Co.* is reported at 375 Mich. 490, 134 N.W.2d 637 (1965). An industrial concern owned a 200 acre tract at the outskirts of a small town. There is a 27 acre pond on this tract into which effluent from the plant is discharged. The action is to recover for the death of two small boys who drowned in the pond, apparently when they were walking on ice which gave way under their weight. The plaintiff contended that the pond would not freeze solid and that the ice was "rotten" even in the coldest weather because of the high concentration of industrial waste in the water, that this created a deceptive and dangerous condition, that children would frequently come around the pond and that the defendant failed to take reasonable precaution for the safety of known infant trespassers.

The dissenting opinion states "It was quite clear * * * that *an extremely deceptive and dangerous condition existed*" (134 N.W.2d 645), and the majority has no statement to the contrary. Three witnesses, two of them employees of the defendant, testified that it was common practice for people to hunt and trap on the defendant's land. There was also evidence that small footprints had been seen and the ponds had been used for skating.

The following special interrogatories were submitted to the jury:

(1) Did the company know or should it have known "that children were likely to trespass?"

(2) Did a condition exist as to which the company "knew, or should have known, involved an unreasonable risk of death to child trespassers?"

(3) Was the utility of maintaining the pond in this condition "slight as compared to the risk to child trespassers?"

The jury answered "yes" to each of these questions.

The Michigan Supreme Court stated the question as follows: "WAS THE VERDICT AND JUDGMENT IN EACH CASE AGAINST THE CLEAR PREPONDERANCE OF THE EVIDENCE AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?" (134 N.W.2d 638).

It proceeded to answer the question in the affirmative, set aside the verdict and award final judgment to the defendant. It distinguished other attractive nuisance cases by stating "awareness of the infant trespasser was a controlling feature" (134 N.W.2d 641).

The King Case

The opinion of the Louisiana Court of Appeal in case number 388, *King v. Vico Ins. Co.*, is reported at 182 So. 2d 135 (1966). The decision was upheld by the Louisiana Supreme Court in a terse ruling reported at 249 La. 111, 185 So.2d 220 (1966). The case is a personal injury action by the passenger in an automobile for the driver's negligence. It was brought directly against the driver's liability insurance carrier as permitted by Louisiana law. Apparently Louisiana has no automobile guest statute. If there is such a statute in Louisiana, neither the court nor the parties considered it applicable.

The insured driver was proceeding down a narrow street passing between two automobiles parked on each side. As they approached an intersection, a dog walked out into the street and went back. Then, as the car came to the street corner, the dog again "ran out in front" of the car and the driver stopped suddenly causing the plaintiff to be

thrown against the windshield sustaining head and neck injuries. The principal defensive contention was that the driver was " 'acting in a sudden emergency not of her own creation.' " (182 So.2d 135-136).

The case was submitted to a jury, apparently on a general charge; the jury being advised that if a sudden emergency arose and the driver acted as an ordinary and prudent person would act under the circumstances shown, it should find for the defendant; that if the accident was caused solely by circumstances beyond the driver's control, that it should find for the defendant; That if the driver could have timely warned the plaintiff and failed to do so, it should find for the plaintiff; and further that if the driver was proceeding at a rate of speed which was unreasonable considering the circumstances then existing, it should find for the plaintiff.

The jury did find for the plaintiff, thereby answering all these questions in the plaintiff's favor.

The Louisiana appellate court differed with the findings of the jury. It reversed, denied a new trial, and entered judgment against the plaintiff. The question of failure to warn was not discussed. Neither did the court discuss the exact proximity between the dog and the car. It stated "We *feel* that * * * Miss Ray instinctively did exactly what other normal persons * * * would have done" (182 So.2d 137) (our emphasis). Concerning excessive speed, the court pointed to the driver's testimony that she had just started up, was in low gear and was traveling not more than 5 miles an hour. It also pointed out that the windshield was not broken where the plaintiff's head struck it but was cracked into a " 'spider web effect,' " that the plaintiff's head was close to the windshield beforehand, and that the plaintiff did not think she was hurt until later on. It concluded "*We are convinced* that Miss Ray operated her car in a normal way." (182 So.2d 138) (our emphasis).

The Sitton Case

The decision of the Texas Court of Civil Appeals in case number 502, *Sitton v. American Title Co.*, is reported at 396 S.W.2d 899 (1965). The Texas Supreme Court refused to issue a writ of error, without opinion, in an unpublished ruling. The plaintiffs in this case brought action against a title company, a real estate broker, and the grantee in a deed executed by the plaintiffs asserting that the defendants had conspired together, misrepresented the transaction involved and had altered the deed by which plaintiffs had conveyed their G.I. home causing default and foreclosure of their G.I. loan, a substantial mortgage deficiency, impairment of their Veteran's benefits, loss of their valuable credit rating, numerous demands for payment which they could not meet and extensive emotional and physical distress resultant thereto.

The instrument was admittedly in the hands of the title company at the time of the alteration and the grantee admittedly "called someone" at the title company and "requested" a "substitution" of grantees (396 S.W.2d 902). The plaintiffs testified that they were assured by the real estate and title company personnel "that [grantee] Moorman would assume the debt" (396 S.W.2d 901). They further produced an agent of the Veteran's Administration who testified that he called on the parties to investigate the matter and "Moorman told me he had her [Mrs. Brown, the title company officer] do it and she told me she did it" (Testimony 403).

All of the numerous special interrogatories to the jury were returned in the plaintiffs' favor. The jury was asked if the deed was altered "pursuant to any conspiracy" defined as a "combination or agreement of two or more persons, by concerted action to accomplish an unlawful purpose" and its answer was "Yes" (Pleadings 150).

Nevertheless, a judgment *non obstante veredicto* was affirmed by the Texas Court of Civil Appeals. The court

stated it could not "find evidence that any two or more of them engaged in concerted action" (396 S.W.2d 903), that "*we think*" (our emphasis) that the plaintiffs' injuries did not " 'naturally flow' " from nor were they " 'directly or immediately caused' " by the alteration of the deed (396 S.W.2d 904), and that "there was no evidence of a conspiracy * * * or of alteration of the deed as a result of conspiracy" (396 S.W.2d 905). Replying to the contentions that the Seventh and Fourteenth Amendments prohibited the court from overriding a jury verdict supported by evidence of probative force, the court stated that it had been directed to "no specific evidence supporting any part of the verdict * * *. Our examination of the record discloses to us no such evidence and no such violation * * *" (396 S.W.2d 905). The court concluded by stating that plaintiffs had been given "every reasonable opportunity to make out a case" and "they failed to do so" (396 S.W.2d 906).

Common Questions Are Presented

The same basic situation is presented in each of the above cases. In each instance, the plaintiff won his case before a jury and lost it before the court. In each instance, the cases were lost not on questions of law but on questions of fact.[1] In each instance, the higher state court did not order a new trial but entered judgment against the plaintiff. In each instance the question is the applicability through the Fourteenth Amendment of the second clause of the Seventh declaring: "No fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

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[1] In **Heider**, it was further held that recovery was barred by the Michigan "free hunting" statute. The applicability of such statute has no bearing on the other two cases and we concern ourselves solely with the Court's rulings concerning the evidence. May we point out in passing that in invoking this statute on appeal for the first time, the respondent is not seeking merely to call the Court's attention to an additional statute or authority, but it is seeking to change the entire theory of the case after the evidence has been closed.

It is obvious that the Michigan Court considers itself free to follow a much lesser standard for re-weighing the evidence than this Court has insisted upon. The testimony that numerous people went on the company land, that small footprints had been seen and that the ponds had been used for skating served to present at least some evidence that the defendant knew or should have known "that children were likely to trespass." This is clearly not a case where "without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway v. United States,* 319 U.S. 372, 407 (dissenting opinion). The Court did not pretend to so hold. Instead, it presumed that it could constitutionally destroy a plaintiffs' verdict on the grounds that it "was against the clear preponderance and contrary to the great weight of the evidence" (134 N.W.2d 643). It is now well established that to employ such a test in the federal courts, even when litigating state-created rights,[2] or to employ such a test in the state courts, at least when litigating federally created rights,[3] is violative of the Seventh Amendment. Should the Constitution not have equal force and effect in all private litigation? Certiorari has been granted in the *Heider* case and it appears that the Supreme Court will undertake to answer this question.

The *King* case is primarily concerned with the inference taking function of the jury. The trial of causes concerns not only the determination of external physical facts but is concerned with the inferences and deductions which may be legitimately drawn therefrom. Certain questions, such as who struck the first blow in an assault case, or whether a signature is genuine in a forgery case, concern physical, external and directly observable phenomena. If the parties or their witnesses unequivocally testify to direct observa-

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[2] **Dick v. New York Life Ins. Co.,** 359 U.S. 437.

[3] **Lavender v. Kurn,** 327 U.S. 645.

tion, the only remaining question is credibility. On the other hand, matters such as foreseeability, proximate cause, intent, scienter and the like may never be observed directly but must be deduced. They are strictly matters of opinion.

In actual practice, the cleavage between the two types of fact finding is almost indistinguishable if not non-existent. There are often no witnesses to a particular physical fact and the existence or non-existence thereof must be deduced. *Heider* is an example; exactly how the boys fell into the pond will never be known. Consider also relative facts such as the speed of a vehicle. While subject to direct observation and the most precise measurement, speed must almost universally go into evidence by lay estimates that, even in complete honesty, can differ in the extreme. Even when there are direct witnesses to the most positive and readily observable facts such as which driver drove across the center stripe of a highway, it is only through the keenest use of the deductive powers that the trier of facts can determine who is telling the truth. Again, the credibility or uncredibility of a witness is a matter of deduction, strictly a matter of opinion.

There is little dispute in *King* over what happened and how it happened. All that remains are the ultimate questions: (1) Did the driver in stopping suddenly conduct herself as would a prudent person *under the same circumstances?* (2) Was the speed shown excessive *under the existing circumstances?*

Of course it is true that a person cannot be held to the same high standard of care when faced with a sudden emergency. It is equally true that human safety is a much higher consideration than the safety of animals. The federal question is who, judge or jury, should make the determination that the conduct of the defendant's insured was justified by the conditions presented? The federal rule fashioned by the Seventh Amendment is clear. The jury is the proper tribunal to find both the external and internal,

the deductive and the inductive facts. *Dick v. New York Life Ins. Co.*, 379 U.S. 437; Green, *Protection of Jury Trial in Diversity Cases*, 35 Tex.L.Rev. 768 (1967). It would appear that the Louisiana rule differs. Such is quite apparent from the Louisiana Supreme Court's ruling that there is no error "on the *facts found* by the Court of Appeal" (249 La. 111; 185 So.2d 220) (our emphasis).

The *Sitton* case presents yet another facet of the same problem. In conspiracy actions, it is almost universally necessary for the plaintiff to secure the bulk of his evidence from the enemy camp. When people enter conspiracies to unlawfully invade the rights of others, they are not apt to call in a witness. Nevertheless, the plaintiffs produced the strongest evidence we can conceive of in a case of this type. They introduced proof that the instrument was admittedly changed in the offices of the title company, a clear fiduciary; presented uncontrovertible evidence that grantee Moorman was the only person who could have furnished the spurious grantee, his own employee; offered evidence that the real estate broker was the middle man and go-between for the entire transaction, the only person in a position to bring pressure to bear upon the title company; and produced an unimpeachable witness to testify that two of the three participants admitted the entire affair and that the title company officer declared that "she was in the habit of doing that * * * when it was necessary" (Testimony 375).

The appellate court chose to close its eyes to much of this evidence, to gloss over the facts and to declare "there was no evidence of a conspiracy to alter the deed in question * * * our attention is directed to no specific evidence supporting any part of the verdict" (396 S.W.2d 905).

While the Texas court gives lip service to the proposition that the jury "are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony" (Pleadings 148), and recognizes that a case should not be taken from the jury

unless there is no room in the evidence for honest difference of opinion, it appears that the court does not truly consider itself bound by such rules and feels free to depart therefrom whenever it subjectively feels a disaffinity for the verdict reached. If the court has taken to itself the authority to depart from the established standards at will, is this not the equivalent of having no standards at all? The case presents the further question whether the Plaintiffs' failure to observe prudent man standards must be decided in the same manner as the Defendants' failure to so act; that is, by judge or jury.

Summary

The three cases present differing aspects of the same basic situation:

(1) The Michigan Court has expressly ennunciated a watered-down test of the evidence not in harmony with the re-examination clause.

(2) The Louisiana Court has expressly held that with respect to the ultimate inferential facts, it is not restricted from finding those facts directly contrary to the jury's findings.

(3) The Texas Court has expressly considered the application of the Seventh Amendment and has obviously decided that the Amendment does not require it to observe any particular standards or prevent it from departing from its own standards at will.

None of the three cases involves the first clause of the Seventh Amendment. In Michigan, Louisiana, Texas and virtually throughout the Union, the electorate of the individual states have chosen jury trial as the established method for determining private rights. Each of the cases involves the second clause of the Amendment prohibiting the re-examination of jury verdicts; a much more difficult question but an even more vital one because liberties are lost by encroachment ten times oftener than they are lost by direct invasion. Does not the *Sitton* case where the court

has undertaken to apply shifting standards, varying standards, or no standards at all directly violate the Fourteenth Amendment guaranty of an orderly trial in accordance with established procedure in a competent tribunal? We suggest that the record presents such question whether or not the court finds that the re-examination clause of the Seventh Amendment has any application in state court litigation.

Other than the F.E.L.A. cases, no decision concerning the application of the Seventh Amendment to state court litigation has been handed down in forty years. We find no decision ever expressly ruling on the power of state courts to overturn jury verdicts. Certiorari has been granted in *Heider*. To bring forward the *King* and *Sitton* cases and to consider the three cases jointly will give the court the greatest possible opportunity to consider the full ramifications of this vital problem. It is respectfully moved that the three causes be either jointly considered or formally consolidated as the court may deem most expeditious.

Respectfully submitted,

October 25, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 174

JOHN SOLE,

Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMPANY, and NEW ORLEANS PUBLIC BELT RAILROAD,

Respondents.

On Petition for Rehearing of Denial of Certiorari to the Louisiana Supreme Court.

OCTOBER TERM, 1966

No. 48

DONALD HEIDER,

Petitioner,

versus

MICHIGAN SUGAR CO.,

Respondent.

On Writ of Certiorari to the Supreme Court of Michigan.

No. 388

JEANNE KING,

Petitioner,

versus

VICO INSURANCE CO. OF ST. LOUIS,

Respondent.

On Petition for Rehearing of Denial of Certiorari to the Louisiana Supreme Court.

No. 502

RUSSELL H. SITTON, ET UX,

Petitioners,

versus

AMERICAN TITLE CO. OF DALLAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

No. _____

ANTOINE BROUSSARD,

Petitioner,

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Respondent.

On Petition for Certiorari to the Louisiana Supreme Court.

APPLICATION FOR REHEARING OF DENIAL OF CERTIORARI, AND FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1,356

JOHN SULE,

Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMPANY, and NEW ORLEANS PUBLIC BELT RAILROAD,

Respondents.

On Petition for Rehearing of Denial of Certiorari to the Louisiana Supreme Court.

OCTOBER TERM, 1966

No. 48

DONALD HEIDER,

Petitioner,

versus

MICHIGAN SUGAR CO.,

Respondent.

On Writ of Certiorari to the Supreme Court of Michigan.

No. 388

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versus

VICO INSURANCE CO. OF ST. LOUIS,

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On Petition for Rehearing of Denial of Certiorari to the Louisiana Supreme Court.

No. 502

RUSSELL H. SITTON, ET UX,

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AMERICAN TITLE CO. OF DALLAS, ET AL.,

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No. _____

ANTOINE BROUSSARD,

Petitioner,

versus

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Respondent.

On Petition for Certiorari to the Louisiana Supreme Court.

APPLICATION FOR REHEARING OF DENIAL OF CERTIORARI, AND FOR JOINT CONSIDERATION OF PETITIONS AND CAUSES.

Movants are petitioners in Case No. 1,356 and in Case No. 388, in which this Court has denied certiorari. They are also petitioners in *Broussard v. State Farm*, application for certiorari in process of being filed, which does not yet have docket number. They now move that rehearing be granted in *King* and in *Sule*, and that all five cases be consolidated or considered jointly. All cases, other than *Broussard*, involve a common question: to-wit, a jury verdict in favor of plaintiff was overturned by trial or appellate court on questions of fact, not involving lack of substantial evidence in support of the jury verdict, but a substitution by the Court of its own opinion as to the verdict the jury should have returned. They also involve a common question of law: to-wit, is the Seventh Amendment prohibition against re-examination of jury verdicts made applicable to the States by reason of Amendment Fourteen? In all said cases the Courts either granted judgment notwithstanding verdict, or reversed and rendered judgment on appeal, without remanding for new trial.

The *Broussard* case likewise presents the broad question as to whether the provisions of Amendment Seven were made applicable to the States by Amendment Fourteen, and presents the same question of appellate court review of facts and rendition of judgment, but otherwise is dissimilar, and presents apparently an even greater exhibition of an appellate court actually depriving a plaintiff of his right to trial by jury. In *Broussard*, the trial judge committed serious errors to the prejudice of plaintiff, and the jury returned a verdict in favor of defendant. The Louisiana Court of Appeal stated:

> For the reasons to be stated below, we think that prejudicial error was committed in the exclusion and in the admission of certain evidence.
>
> We are thus unable to accord the usual weight to the jury verdict. Such findings by the trier of

fact are on review usually accepted in the absence of manifest error; this usual role cannot apply where there is a reasonable possibility that the trial jury's finding was incorrectly based due to prejudicial rulings incorrectly excluding or admitting evidence by reason of which the jury might have reached a contrary verdict.

* * * * *

* * * Counsel contends that the verdict is in error as a result of two prejudicially erroneous evidentiary rulings by the trial court;

(1) The trial court's failure to permit the plaintiff Broussard to introduce all of a discovery deposition taken from him, after the defendant State Farm had questioned him as to isolated excerpts contained therein;

(2) The trial court's overruling the plaintiff's counsel's objection to interrogation of the plaintiff requiring his compromise of his claim against Martin, the alleged joint tortfeasor, and requiring him to testify as to the same.

For the reasons to be set forth below, we think these contentions are correct and accordingly have determined the merits independently of the jury verdict.

* * * * *

Since we have determined that the trial jury's verdict should be disregarded because of the prejudicial exclusion of the plaintiff's discovery deposition and because of the prejudicial admission of evidence of the compromise, it is unnecessary for us to discuss other allegations of error in rulings or instructions to the jury, which without discussion we will simply state we do not find to be well-founded.

Despite a detailed consideration of the prejudicial errors committed by the trial court in *Broussard*, and re-

peated an unequivocal statement of the Louisiana Court of Appeal that such errors constituted serious prejudice to plaintiff, said appellate court affirmed the verdict and judgment of the lower court, stating:

> After reviewing the entire record, including a deposition of the plaintiff taken prior to trial which was incorrectly excluded from the evidence submitted to the jury, we have concluded that the preponderance of the evidence supports the jury's special verdicts and that the trial court's judgment should therefore be affirmed.

It is to this that the arrogant disdain with which judges view trial by jury has brought us. In *Broussard*, plaintiff asked for and received trial by jury, the jury returned a verdict against plaintiff because of serious and repeated errors made by the trial court, the appellate court recognized and denounced the errors of the trial court, specifically finding them to have been seriously prejudicial to plaintiff, whereupon the appellate court did not remand the case for new trial, but stated an opinion that the evidence considered as a whole preponderated in favor of defendant.

On application to the Louisiana Supreme Court for writ of review, that Court tersely stated, "Writ refused. **On the facts found by the Court of Appeal,** the result is correct."

To this extent has trial by jury been made an empty shell by the over-weening self-esteem of the judiciary, a trait unfortunately not confined to state courts.

HEIDER V. MICHIGAN SUGAR CO., 375 MICH. 490, 134 N.W. (2d) 637

This was a wrongful death action, following the death of two small boys by drowning during the winter in a pond that was frozen over, but not solidly frozen because of the

concentration of industrial waste in the water, the apparent condition of the ice being deceptive and dangerous. Plaintiff's action rested largely upon "attractive nuisance", and the evidence further disclosed that adults frequently hunted and trapped near the pond, that children frequented the area, that small footprints had been seen and the pond had been used for skating. The jury had replied in the affirmative to the following special interrogatories:

> 1. Did the company know or should it have known that children were likely to trespass?
>
> 2. Did a condition exist as to which the company knew or should have known, involved an unreasonable risk of death to child trespassers?
>
> 3. Was the utility of maintaining the pond in this condition slight as compared to the risk to child trespassers?

The Michigan Supreme Court held the issue to be, "Was the verdict and judgment in each case against the clear preponderance of the evidence and contrary to the great weight of the evidence?" In so stating the issue, that Court departed from the common law rule that the verdict of a jury may be overturned only when there is no substantial evidence on which such verdict could have been based, but may not be reversed when such evidence does exist, merely because the appellate court may be of the opinion that a preponderance of the evidence is to the contrary.

SITTON V. AMERICAN TITLE CO.,
396 S.W. (2d) 899

Plaintiff, owner of a home subject to mortgage guaranteed by the Veteran's Administration, entered into an agreement with one Moorman to trade this home for one owned by Moorman, the latter to assume the mortgage on

plaintiff's home, the agreement being conditional upon plaintiff being able to secure a mortgage loan with respect to the Moorman house. The condition having been met, plaintiff and his wife signed the act of sale before Mrs. Brown, Notary, and manager of defendant title company. More than two weeks elapsed before Mrs. Brown recorded the act of sale, and when it was recorded the name of Moorman had been erased in several places, and the act changed to show the purchaser to be one Trout, employee of Moorman, who promptly defaulted on the mortgage payments, and the government foreclosed, leaving a deficiency judgment against Sitton.

Liability rested upon the issue of who caused the alteration of the document, whether the change was with the knowledge and consent of plaintiff, and whether two or more persons were concerned in the alteration.

Plaintiff and his wife testified that when they signed the act before Mrs. Brown, the document named Moorman as the purchaser. Mrs. Brown testified that she had been instructed to make such alteration, and admitted the long delay before recordation; she testified she had been instructed to make such alteration. Moorman testified that he had given such instruction, and the remainder of his testimony, in which he professed not to remember anything at all, is patently spurious. A VA employee testified that Moorman had told him that he, Moorman, had directed Mrs. Brown to alter the instrument and that she had done it, and that Mrs. Brown had admitted it to him.

In addition to the monetary loss sustained, plaintiff and his wife suffered emotional trauma, which resulted in physical injury to the wife and a regression to a childhood speech defect on the part of plaintiff. The jury found for plaintiffs in every respect, and the trial court then entered

judgment notwithstanding verdict. The Texas Court of Civil Appeals stated "we think" that plaintiffs' injuries did not "naturally flow" from, nor were they "directly or immediately caused" by, the alteration of the deed.

Plaintiff's application for writ of error was refused by the Supreme Court of Texas, without opinion.

KING V. VICO INSURANCE COMPANY, 182 SO. (2d) 135

This was a suit based upon physical injuries by an automobile passenger, brought against the public liability insurer of the owner and driver of the automobile. Louisiana has a "direct action" statute authorizing suit by an injured person directly against the offender's insurer. Louisiana has no guest passenger statute. The automobile was proceeding along a street so narrow that there was hardly more than room for one automobile to pass between the automobiles parked on both sides of the street, when a dog first walked into its path, turned and went back, and then ran out again, at which time the driver applied the brakes so forcefully that plaintiff was thrown against the windshield, her head breaking the glass thereof, plaintiff sustaining head and neck injuries. Defendant relied primarily on the contention that the driver was "acting in a sudden emergency not of her own creation." The jury was properly instructed with respect to sudden emergency and unavoidable accident, as well as the legal effect of any evidence relating to speed of the automobile, and the jury returned a verdict for plaintiff.

The Louisiana Court of Appeal reversed on questions of fact, Louisiana appellate courts being authorized by the constitution of that State to review in civil cases the facts as well as the law, as a consequence of which civil jury

trials in Louisiana have been extremely rare until very recent years, inasmuch as the cost to plaintiff for a jury trial is generally about $750.00 more than the cost for a judge trial, and it has scarcely seemed a justified expense for either party when the Louisiana appellate courts make independent determinations of fact from the record.

However, in recent years the Louisiana Supreme Court has held that an appellate court may reverse a jury verdict only when the latter is obviously "in manifest error". *Gaspard v. Lemaire*, 245 La. 39, 158 So. (2d) 149; *Ballard v. National Indemnity Co.*, 246 La. 963, 169 So. (2d) 64.

Even so, the manifest error rule has received no more than lip service from the inferior appellate courts of that State (*Luquette v. Bouillion*, 184 So. (2d) 766), and the appellate courts of Louisiana have tenaciously asserted their right to review the facts, even though there is substantial evidence to support the verdict of the jury. *Fontenot v. Marquette Casualty Co.*, 161 So. (2d) 467; *Dore v. Hartford Accident and Indemnity Co.*, 180 So. (2d) 434.

Moreover, even the "manifest error" rule announced in the *Ballard* case is contrary to the common law limitation of appellate review of jury verdict.

In reversing the jury verdict in *King*, the Louisiana Appellate Court stated, "We are convinced that Miss Ray operated her car in a normal way * * *." (Emphasis supplied)

SULE V. MISSOURI PACIFIC, 181 SO. (2d) 280

Plaintiff, operating a mobile crane, was injured as a consequence of a collision with defendant's train. The grade crossing contained five sets of railroad tracks, and the crane, a slow-moving vehicle, had a boom extending

25 feet in front. When plaintiff became aware of the approaching train about 250 feet away, at which time the train was moving at about 10 miles an hour, plaintiff could not be certain upon which set of tracks the train was approaching, and it was too late for him to have backed off the tracks so that the boom would not be extending over them, so he sought to continue with the crossing, but was struck by the train.

The jury was instructed with respect to negligence, contributory negligence, and the doctrine of last clear chance, and no fault was found with the court's instruction to the jury, which brought in a verdict for plaintiff.

The Louisiana Court of Appeal reviewed the evidence, and decided to accept the testimony of defendant's engineer and fireman that the train was not as much as 250 feet from the crossing when the crane came upon the tracks, and further found that the train could not have been stopped in this shorter distance.

Judgment in favor of plaintiff was reversed, and judgment rendered in favor of defendant by said appellate court.

On application for writ of review, the Louisiana Supreme Court merely stated, in denying the application, "Writ refused. **On the facts found by the Court of Appeal,** there is no error of law in its judgment." 182 So. (2d) 664.

BROUSSARD V. STATE FARM, 188 SO. (2d) 111

This was a suit by an injured passenger in an automobile which was proceeding through heavy fog when it collided with a larger trailer truck which was making a left turn, all of the trailer except the last 8 feet or so having cleared the highway. Plaintiff, who sustained multiple

and serious injuries, including skull fracture and brain damage, which resulted in progressive loss of memory, filed suit against the driver and the owner of the truck, and their alleged liability insurer, and against the liability insurer of the driver of the car in which plaintiff was a passenger. While the latter insurer, State Farm, first pled contributory negligence as a defense, this was specifically withdrawn on the day of trial, so that the only issue with respect to State Farm was that of any negligence on the part of its insured.

The other insurer, National Indemnity, denied that it was the carrier for the owner or operator of the truck, and numerous depositions were taken of witnesses in the western part of Texas. This evidence disclosed that the truck had been purchased about 3 days before the accident, that the purchaser had gone to a local insurance salesman and had requested coverage, that the salesman had then placed a long distance telephone call, presumably to a general agent in another city, and had not told the purchaser that he would be covered, that about 10 days after the accident, the owner traded this truck for another, and then requested insurance coverage from the same local agent, after which a policy issued from National Indemnity covering this new truck, but that no policy was ever issued with respect to the truck involved in the accident, and the owner was not informed as to the identity of the insurance company that presumably was to cover the first truck, nor did he ever pay any premium for such coverage.

These depositions likewise disclosed that any judgment obtained against either the driver or the owner of the truck involved in the accident would be worthless, because of the poverty of those defendants. Consequently, on the morning of trial, in view of the very serious dispute as to insurance coverage, plaintiff entered into a verbal

agreement whereby the driver and the owner of the truck, and the alleged insurer thereof, would subsequently be given a restricted release in return for payment of $15,000.00 made by said insurer.

Trial then proceeded against the insurer of the automobile in which plaintiff had been a passenger, plaintiff adopting alternative positions. First, he sought to recover under the public liability portion of State Farm's policy, because of negligence on the part of the driver which caused or contributed to the accident. Second, and alternatively, he sought to recover under the "uninsured motorist" provision of State Farm's policy, under which he would be entitled to recover if his driver were found to be free of negligence, and the driver of the truck was found to have been not covered by public liability insurance.

During the trial, plaintiff testified that, as a consequence of his head injuries, plaintiff had suffered a progressive loss of memory, that he had suffered some loss of memory by the time his deposition on oral examination had been taken after the accident but many months before trial, and that he had suffered further loss of memory since the time his deposition had been taken.

During the trial, after such testimony had been given, defendant's attorney sought to question plaintiff with respect to his previous deposition, primarily concerning his statement at that time to the effect that he did not know what his driver could have done to have avoided the accident. Plaintiff answered that he remembered having given a deposition, but had no recollection of specific questions or answers. Plaintiff's counsel objected then to an effort by defendant's counsel to read from the deposition, basing the objection upon the fact that such reading could not refresh plaintiff's recollection, that a plaintiff could not be compelled to express an opinion as to the driver's negli-

gence, this being a question for the jury to determine (when the deposition had been taken, the parties had stipulated that objections could be urged for the first time if any part of the deposition was sought to be used at the time of trial for any purpose), and that the brief portion of the transcript which defendant's counsel proposed to read, and the portions which he did afterward read, were taken out of context and were misleading.

The Court overruled the objection, and permitted defendant's counsel to read the brief excerpt from the deposition, after which plaintiff's counsel asked to have the entire deposition read, or at least all portions relative to the issue, and when this was denied, plaintiff's counsel subsequently sought to offer the entire deposition in evidence, and the Court likewise refused to permit this.

As has been mentioned, the Louisiana appellate court found these rulings to be directly contrary to the Louisiana statute, and likewise found the portions of the transcript read by defendant's counsel to have been taken out of context, and such reading to have been highly prejudicial to plaintiff, and the Court's rulings with respect to the use of the deposition to have been totally erroneous and substantially prejudicial to plaintiff's case.

In addition, defendant's counsel was permitted to question plaintiff concerning the compromise agreement he had entered into with the other defendants. (By specific Louisiana statute, no such compromise has any effect until it has been reduced to writing.)

Over timely objection by plaintiff's counsel, the Court permitted such questioning, under the stated belief that same was being done for the limited purpose of the legal effect such a restricted release might have on the ultimate liability of State Farm, in the event of a verdict in favor

of plaintiff. In this, the Court was plainly in error, as such legal effect could not have been determined by the jury, but would have been a question of law to have been applied by the Court after the jury had answered the special interrogatory fixing the monetary amount of damages.

Moreover, it was always plain to everyone but the trial court that defendant's purpose in presenting such evidence was solely for other purposes, that is, as proof that the truck driver was not an "uninsured motorist", and that plaintiff was to receive $15,000.00 from the former defendants, thereby hoping to induce the jury to deny plaintiff any recovery from the insurer of his friend, driver of the car in which plaintiff had been a passenger.

Such purpose was specifically carried out in the argument of defendant's counsel to the jury, the portions of such argument having been taken down by the reporter, and made part of the record on appeal.

In this respect also, the Louisiana appellate court noted the reasons given by the trial judge for having admitted such evidence, and held that the trial court committed serious error in doing so. The appellate court also called attention to the closing argument made by defendant's counsel, and held specifically that the ruling of the Court had substantially prejudiced plaintiff's case, and was utterly contrary to law.

Except for the testimony concerning the compromise agreement, there has never been and is not now in the record any evidence whatsoever with respect to insurance coverage on the part of National Indemnity, defendant's counsel having argued to the jury that said insurer would not have agreed to pay $15,000.00 if it had not insured the owner and operator of the truck. In the total absence of such evidence, plaintiff had to recover either because of the

negligence of his driver or because the truck driver was an uninsured motorist, inasmuch as State Farm had abandoned its defense of contributory negligence.

In returning a verdict against plaintiff, the jury answered special interrogatories, one of these stating that State Farm's driver had not been negligent, and another finding that the operator of the truck had been covered by public liability insurance.

Having found that the trial court had committed at least two serious errors of law, which manifestly operated to the prejudice of plaintiff's case, and having stated this categorically and in considerable detail, the Louisiana appellate court then held that the record as a whole would have justified the jury's verdict, and proceeded then to affirm the judgment.

The jury having found no negligence on the part of State Farm's insured, it would have followed as a matter of law that plaintiff would have been entitled to a judgment against State Farm, under the "uninsured motorist" provision of its policy, unless there were a policy of public liability covering the truck driver, and since there was no evidence whatever to show such insurance coverage, other than the implication that was drawn from testimony concerning the compromise, which the appellate court held had been erroneously admitted, the record certainly did not support the decision with respect to recovery under the "uninsured motorist" provision.

It might be added here that State Farm did not offer transcript of the depositions of the witnesses in Texas, and that plaintiff offered the transcript of the deposition of the local insurance salesman there, wherein he denied that he had ever told the owner of the truck that he was covered.

In stating that it had examined the entire record, said

appellate court necessarily meant that it was also considering the very evidence which it had ruled to have been illegally admitted, because aside from such illegally admitted evidence, there was nothing whatever in the record to have supported the jury's verdict, at least with respect to recovery under the "uninsured motorist" provision.

Timely application for rehearing was denied, and on application to the Louisiana Supreme Court for writ of review, that Court held, "Writ refused, On the facts found by the Court of Appeal, the result is correct."

COMMON QUESTIONS PRESENTED

In all five of the cases here sought to be consolidated, the appellate court made independent review of the record, and based its decision upon its interpretation of the facts, and not upon a question of law. In all cases, the appellate court did not remand for new trial, but entered judgment.

In all five cases, there was presented to the appellate court the question of the effect of Amendment Fourteen upon Amendment Seven of the United States Constitution; in *Broussard*, the question was the complete denial of jury trial, even though jury trial had been granted and plaintiff could not be deprived of such. Thus, the question was whether plaintiff had been illegally deprived of right to trial by jury, and whether the appellate court had reexamined in a manner contrary to common law.

In the other four cases here sought to be consolidated, it is not contended, as it is contended in *Broussard*, that the ruling of the trial court deprived plaintiff of trial by jury, the issue being the effect of the last portion of Amendment Seven, and whether same, by virtue of Amendment Fourteen, applies to proceedings in State Courts.

There can be no question as to whether each of the

State Courts here in question has acted in a way contrary to common law principles referred to in Amendment Seven.

The common question presented by all five cases is whether all or any part of Amendment Seven has been made applicable to the states by reason of Amendment Fourteen.

The additional issue presented by *Broussard* is whether he has been deprived of due process of law, under Amendments Five and Fourteen, in that Louisiana having provided for jury trial in civil cases, Broussard having obtained such trial by jury, the jury having heard his case, and having reached an adverse verdict as a consequence (as the appellate court asserted), of at least two serious and substantial errors committed by the trial court, an independent ruling upon the facts by the appellate court amounted to a deprival of trial by jury, especially when the record, aside from the evidence found by the appellate court to have been inadmissible, was utterly barren of any evidence contrary to plaintiff's claim under the alternative of the "uninsured motorist" provision.

It requires no more than a cursory reading to ascertain that the courts of Michigan, Texas and Louisiana, in these cases, consider themselves free to follow a course far removed from the standard insisted upon by this Honorable Court, and with respect to this, and in all other respects, the instant motion adopts by reference all material portions of the record, pleadings and briefs in *Heider* and *Sitton*.

With respect to *King*, *Sule* and *Sitton*, this Court has heretofore denied certiorari, and rehearing is now being requested.

It is understood that this Court has granted certiorari in *Heider*, thereby indicating that it intends to answer the

common questions presented in all cases, and it would deprive other applicants of equal justice if this Court considered one case and denied other applicants who were contemporaneously seeking to present the same question.

With respect to *Broussard*, inasmuch as it involves the common general issue, the application for certiorari now being presented in that case should also be granted, and even though *Broussard* presents a different specific issue, although the same general issue of the applicability of Amendment Seven (plus direct application of Amendments Five and Fourteen), that case should likewise be consolidated with the others.

Since certiorari has been granted in *Heider*, there exists no legitimate reason for this Court to turn away from its doors other applicants who stand in the same position and who have from the earliest possible opportunity sought to raise the same constitutional questions, whereas a consolidation of all five cases, including *Broussard*, will best permit this Court the opportunity to consider the possible ramifications of the questions here involved, as they relate to the fundamental right of trial by jury, and to determine whether the right to trial by jury, anywhere in this land, and the common law principles without which trial by jury can be only a mockery, can be denied even under the guise of having granted same.

In the event that the Court should decline to consolidate some or all of these cases, it is requested that joint consideration be given to them, at least to the extent that the cumulative particulars point out the necessity for clear decision by this Court in each case.

Should the Court decline to consolidate the cases otherwise, it is suggested that all three of the Louisiana cases should be consolidated. In all three of these cases (*King*, *Sule* and *Broussard*), the Louisiana Courts of Appeal ren-

dered judgment based upon the appellate court's evaluation of the facts, and when the respective plaintiffs sought writs of review from the Louisiana Supreme Court, the ruling in each case was, "On the facts found by the Court of Appeal, the result is correct." Thus, the Courts of Appeal in Louisiana are making rulings on facts without reference to the verdicts of a jury, and plaintiff's are being then deprived of any further review, since the Louisiana Supreme Court is consistently declining to review the facts, but is accepting the facts as found by the Court of Appeal, so that such litigants are in Louisiana being deprived of due process under Amendments Five and Fourteen, inasmuch as appellate review of facts is not limited to the Courts of Appeal.

Respectfully submitted,

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CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS:

I, J. Minos Simon, counsel for petitioner and a member of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid, as follows, to-wit:

Honorable Melvin J. Keenan, Clerk,
Louisiana Court of Appeals, Fourth Circuit,
New Orleans, Louisiana.

Mr. Val J. Courville, Clerk
Louisiana Supreme Court,
New Orleans, Louisiana.

Porteous & Johnson,
Hibernia Building,
New Orleans, Louisiana.

Phelps, Dunbar, Marks, Claverie & Sims,
Hibernia Building,
New Orleans, Louisiana.

_____
J. MINOS SIMON

Sworn to and subscribed
before me this _____ day
of November, 1966, at
New Orleans, Louisiana.

_____
NOTARY PUBLIC

CERTIFICATE

STATE OF LOUISIANA
PARISH OF ORLEANS:

I, J. Minos Simon, counsel for petitioner and a member of the United States Supreme Court; hereby affirm under oath that the foregoing petition is submitted in good faith and not for purposes of delay.

J. MINOS SIMON

Sworn to and subscribed
before me this _____ day
of November, 1966.

NOTARY PUBLIC